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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959

No. 517

QUALITY COAL CORPORATION
AN INDIANA CORPORATION
Petitioner,

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents

Reply to Respondents Brief In Opposition

JOHN R. JETT,
505 Ohio Street,
Terre Haute, Indiana.

N. GEORGE NASSER,
24 N. Sixth Street,
Terre Haute, Indiana,
Attorneys for Petitioner

INDEX

	Page
Reply to Respondents' Point A	1, 2, 3
Reply to Respondents' Point B	3-7
Reply to Respondents' Point C	7-12
Reply to Respondents' Point D	12
Reply to Respondents' Point E	12-15
Reply to Respondents' Point F	15
CONCLUSION	15

LIST OF AUTHORITIES CITED

Table of Cases

	Page
American Brake Shoe Co. vs. NLRB, 244 Fed. 2d 489	8
Birmingham vs. Bartels, 157 Fed. 2d 295	7
Gatliff Coal Co. vs. Cox, 152 Fed. 2d 52	12
Harris vs. Glucose Sugar Refining Co., 116 Fed. 304, 307-8 (1902)	10
Lewis, et all vs. Benedict Coal Corp. (1958), 259 Fed. 2d 346, 354	4, 6, 15
Lewis vs. Cable (1952), D. C., W. D. Pa., 107 F. Supp. 196	10
Lewis vs. Fentress, 160 Fed. Supp. 221	1
Lewis, et al. vs. Quality Coal Co., 243 Fed. 2d 769	12
NLRB vs. Broderick Wood Products Co., 261 Fed. 2d 548	6
NLRB vs. Gaynor News Co., 197 Fed. 2d 719, 723	6
NLRB vs. Gottfried Baking Co., 210 Fed. 2d 772	6
NLRB vs. McGraw & Co., 206 Fed. 2d 635	7
NLRB vs. Rockaway News Supply Co., 345 U.S. 71	2, 5
NLRB vs. Shuck Contr. Co., 243 Fed. 2d 519, 521	6
NLRB vs. United Brotherhood C & J, 202 Fed. 2d 516	7
Red Star Express Lines vs. NLRB, 196 Fed. 2d 78	6
United Marine Division vs. Essex Transportation Co., 216 Fed. 2d 410	14

Page

U. S. vs. Campbell, 139 Fed. 2d 424 14

U. S. vs. Carter, 1 L. Ed. (2) 776, 353 U. S. 210 13

U. S. vs. Embassy Restaurant, 359 U.S. 29, 3 L. Ed. 2d 601 13

U. S. Rubber vs. Moon, 93 Ind. Appellate 571, 179 N.E. 26, 28 9

Statute.

29 U.S.C.A. 158 (A) (3) 2, 3

29 U.S.C.A. 157 ..... 2, 3

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Respondents.

REPLY TO RESPONDENTS POINT A

The majority opinion is in conflict with established law and contrary to other Circuit Courts of Appeal.

Respondent's argument is not sound. Their interpretation of various decisions is contrary to sound legal reasoning.

The decision of **Lewis vs. Fentress Coal and Coke Co., Inc.,** 160 Fed. Supp. 221, affirmed 264 Fed. 2nd, 134 is not in point. It is only fair to review the facts. No question of violating Federal Law was involved. The only contention was whether or

not the Contract violated the Tennessee Right to Work Law. Fentress contended that since the contract was executed in Washington, D.C., which permitted Union Shops, its enforcement in Tennessee was prohibited. This decision is not authority to support the majority opinion. Forcing non-union employees to join the Union on the morning of the third day not only violated Section 8 (A) (3) but it also violated 29 USCA, Section 157 and violation of these two Federal Sections were not raised in the Fentress Case.

Respondents are in error when they state that the majority opinion agrees with **NLRB vs. Rockaway News Supply Co.**, 345 U. S. 71. The issues were entirely foreign to the issues here. An employee refused to cross a rival picket line and was fired. The contract in the **Rockaway** case had a separability clause. Such is not the case in the agreements in the complaint. It will be noted in Resondent's Exhibit "C" in their brief under Appendix 2, at page 38, the following:

> "This agreement is an integrated instrument and its respective provisions are interdependent * * *."

The Rockaway Agreement had a separability clause.

Respondents say that the Union Security provisions on their face, show an intent to have a lawful meaning in view of the phrase "to the extent and in the manner permitted by law", and that the legal principle have no application. Since the evidence showed without question that in the operation under the agreement at the mine a Closed Shop was rigorously maintained, then and in what situations are principles of law to be applied? As Judge Schnackenberg stated in his dissenting opinion, at pages 27 and 28 of the petition,

> "As far as this case is concerned, by Judicial deci-

sion, a part of a federal act has been in effect repealed. The act was not saved; a contractual provision in violation of the act is saved."

The purported savings clause, "to the extent and in manner permitted by law," means that 29 USCA 158 prohibits forced membership before the 30 days grace period. It likewise means that 29 USCA 157 gives the worker the freedom to join the union at any time before the 30 days expires.

REPLY TO RESPONDENTS POINT B

The majority opinion notwithstanding undisputed evidence of forced union membership, creating a Closed Shop, saw fit to detour around Section 8 (A) (3) by avoiding the Closed Shop argument.

The majority opinion among other things at page 22 of the petition says:

"The provisions of § 158 (a) (3) do not prohibit as unfair labor practice, or invalidate, collective bargaining agreements requiring union membership as a condition of employment provided becoming such a member may be deferred to or after the thirtieth day following the beginning of employment, or effective date of the agreement, whichever is later."

How can this statement be reconciled with the evidence in the record of forced union membership on the morning of the 3rd day of employment?

The opinion at the same page, among other things continues:

"Of course, without the portion italicized (the grace

period of 30 days) above the provisions of the agreement here under consideration would violate § 158, **Lewis** vs. **Jackson & Squire**, D. C. 86 F Supp. 354 * * *."

The majority opinion admits that if the 30 day grace period were omitted, the contract would be void. Yet, the fact that a closed shop was maintained was ignored.

The majority opinion further states, among other things:

> "The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract."

This is in direct conflict with Lewis et al., vs. Benedict Coal Corporation, (1958), 259 Fed. (2) 346, 354, which held that where an agreement is an integrated instrument and its respective provisions are inter-dependent, the agreement must be considered in its entirety.

At page 12 of their brief Respondents continue to quote from the Fentress Case as being the sole precedent. We have already distinguished this decision.

If any fatuous reasoning has been used, Respondents are certainly past masters in this field. They continue by stating the interpretative processes so used would be at odds with principles which denounces the right of Courts to ignore expressed provisions of a contract. How naive can one reason? What about ignoring the express letter of the law?

Respondents at page 13 of their brief infer that where two constructions may be made, the lawful construction must be invoked. We find no quarrel with this statement. There is only one construction to be made in this case. The majority opinion has seen fit to, in our opinion, to make the wrong one.

The Rockaway Case at page 14, of their brief, is com-

pletely foreign here. There was a separability clause and the quotation is not applicable in this case.

Again respondents do a "Houdini" in quoting from the **N.I.R.B. Vs. Rockaway News Supply Co., 345 U.S. 71.** However, either innocently or deliberately, at page 79, line 6 to line 10, they overlooked the folowing:

> "Moreover, there is no showing that these illegal provisions in any way affect Waugh's employment, his discharge, or any conduct of any party that is relevant to the decision."

We have shown the illegal conduct of the Union and have shown by evidence which is not controverted that the law was violated. The condition precedent in the contract as to union members was a violation of the law.

The quotation of the majority opinion at page 16 of respondent's brief is contrary and in conflict with the closed shop prohibition.

We certainly admit that the 30 day grace period must be read into the contract. When the Union forced Management into a closed shop, the contract was nullified. The fact that the 30 day grace must be read into a contract did not stop the action of the Union in enforcing the illegal clause of employment in the contract by forcing non union members to join the Union within 72 hours after employment.

Again at page 15, respondents find fault with the dissenting opinion by quoting the Fentress Case. Fentress has no application here.

2.

The Authorities Submitted By Quality Are Controlling. Respondents attempt to explain away the rulings in the

Gottfried, Red Star and **Gaynor Cases**, to say the least, lacks good legal reasoning. In order not to burden this Court with repetitions, we refer to pages 28 and 29 of our petition wherein Judge Schnackenberg reviews these cases.

Without unduly extending our remarks we cannot help but refer the Court to the three cases following:

The "savings clause" being a provision of the Agreement and since the respective provisions were interdependent on one another, the Agreement had to be considered in its entirety. Therefore, the illegal provision destroyed the entire Agreement. (**Lewis et al. v. Benedict Coal Corp.** (1958), 259 Fed. 2d 346, 354.)

It was held in **NLRB v. Broderick Wood Product Co., et al.** (1985), 261 Fed. 2d 548, 555, 556, 557 that the savings clause did not salvage or save the illegal clause in the contract. The Court stated, at p. 558:

> "The mere execution . . . . * * * is itself an unfair labor practice within the Act. The savings clause does not avoid that rule."

In **N. L. R. B. v. E. F. Shuck Construction Co.**, 9 Cir., 243 F. 2d 519, at p. 521, the Court stated, concerning another illegal union-security clause:

> "The mere retention of such a clause in a contract in force between the parties is a continuing unfair labor practice even when there is no attempt to enforce it, because so long as it remains a part of the contract it 'tends to encourage membership in a labor organization' in violation of Section 8(a) (3)."

It can readily be seen that the mere retention of such a clause without enforcing it violates the Act.

Respondents explanation of the **United Brotherhood C. & J.** and **McGraw** cases at page 19 of their brief, in our opinion is very weak. Without too much stress, we cannot help but refer you to page 9 of our petition, wherein the **McGraw** case is cited. The Court therein held a violation of the Act if the Union, "entered into, maintains, or causes the enforcement of a closed Shop."

Respondents try to force adherence to the **Rockaway Case** by quoting excerpts therefrom which are abstract propositions of law and which do not coincide with the issues here. Again the **Rockaway** agreement had a separability clause which does not exist in the **Quality** Case. Hence, the Court's statement,

> "The total obliteration of this contract is not in obedience to any command of the statute . . . ."

is not binding and of no force in this cause.

REPLY TO RESPONDENTS POINT C.

The Seventh Circuit's decision that the defense of Duress was without merit, was based on an authority completely foreign to the issues before it.

The Contract Was Void Because it Was Made Under Duress.

The majority opinion states:

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress and mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract."

This statement is quoted from **Birmingham v. Bartels**, 157 Fed. 2d 295. The majority opinion no doubt, in quoting

from the **Birmingham** case, overlooked part of the **Birmingham** opinion in this, to-wit:—

> "A Court of law cannot acknowledge a contract because of alleged unfairness in the negotiation by which the obligation has been created, **unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them attempted to be proved.**" (Our emphasis.)

Numerous undisputed affidavits are in the record showing that duress was perpetrated on this operator. (Record pp. 101-105; Record pp. 193-198.) The **Birmingham** case with the omission considered over-rules the majority opinion. In the case at Bar the evidence was replete that the operator was coerced in executing the Agreement, and the evidence sustained the affirmative defenses.

(1)

Legal Strikes Are Permitted.

We agree that legal strikes are permitted. The majority opinion invokes this law in its decision by citing **American Brake Shoe Co. vs. N. L. R. B.**, 244 Fed. 2nd 489, but the majority opinion goes too far; the admitted facts in the record show that a closed shop had been rigorously maintained. In the American Brake case the majority opinion have no doubt innocently overlooked the Courts comment at page 492 as follows:

> "However, as has been observed by the Board, the rights of the employees to engage in collective bargaining and to strike in furtherance of their economic demands must **be balanced against the employers rights to protect his business against loss.**"

Again, in the same case at the same page, the Court states:

> "Indeed the Board has held, in a series of cases that, **where unusual economic hardship or operative conditions are found to exist, an employer faced with a threatened or actual strike, may take certain protective measures.**" (our emphasis)

In view of the record before it, how can the majority opinion be justified when a closed shop was rigorously maintained?

In **U. S. Rubber Co. v. Moon**, 93 Ind. App. 571, 179 N. E. 26, 28, the Court held:

> "It is not the threat of criminal prosecution * * * that constitutes duress, but the condition of the mind produced thereby. The threat must be of such nature and made under such circumstances as to * * * control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by said person while in such condition."

Contracts Were Not Ratified.

Respondents seem to overlook essential facts. Petitioner at no time ratified said contracts. Not one cent was paid into the pension fund. Certainly, we admitted many tons of coal were mined. The checking off of union dues was legitimate and in compliance with Indiana law and was money deducted from each employee to pay their dues. This does not detract from the fact that the contracts were illegal nor that this was a closed shop nor does it go to show the state of mind of the employer in executing the contract.

The case of **U. S. Rubber Co. v. Moon** has no bearing here. No payments to the pension fund were made.

Defendants Are Not Estopped to Set Up Duress.

What we know as men, surely we know as judges and lawyers. Here is a small operator who, under mental coercion, in order to preserve his business and to maintain some 55 miners at work, did involuntarily and contrary to his free will, execute the agreement. These miners loaned the money to keep this mine operating in order to preserve their jobs. Respondents state that petitioner is attempting to deprive the same employees of benefits from the fund. They further state that Quality's effort is in conflict with good conscience and equity. These 50 or 55 employees, realizing if the mine had been sold under a former judgment, the mine would have been closed and they would have been out of a job. They were more concerned with present income and not pensions in the future.

Appellee cites **Harris** v. **Glucose Sugar Refining Co.**, 116 Fed. 304, 307-8 (1902), which has no bearing on this case. That case involved the appellant who signed a five-year contract and then agreed not to work for a competitive firm. He violated that clause and appellee filed suit for an injunction. Appellant raised the objection that appellee was an illegal trust, condemned by the State of Ilinois. They held that they could not on one hand take the benefit of the bargain and on the other, defend on the grounds of the illegality of the combination. This in no way affects the present suit for the reason that the illegal action is based upon the forcing of employees joining the Union within three days and not the required thirty days, and if petitioner had not signed the contract, the employees would have stopped work and the mine would have been shut down.

Respondents cite **Lewis v. Cable**, 1952, D. C., W. D. Pa., 107 F. Supp. 196. This case is distinguishable. Cable made

substantial payments and thereafter a year later wrote a letter that the balance would be paid by his broker upon sale of coal. Cable filed an affidavit that the payments were made under infuence of fear of strike and repercussions which would entail irreparable loss, etc. Respondents would urge that the Cable case is identical to present case. This is not true. Cable made payments and promised to pay the balance. At no time did Cable plead the affirmative defenses we have. He did not raise mental coercion, duress, illegality of contract, closed shop, preferential hiring, no legal trust, unilateral contract, improper parties.

The Court in the Cable case stated:

> "In fact we are of the opinion that proof of his subjective intent is not material and would not be admissible in evidence."

Petitioner, insofar as the facts and pleadings in the present care are involved, takes issue with the above. As otherwise stated in our pleadings and briefs, the condition of the mind of defendant and the question of reality of assent are controlling.

The Court stated further in the Cable case:

> "If he thought this was sheer extortion, he would not have paid it. The same is true of the promise in his letters to continue payments after he returned to work. If he did not believe he owed the money, he should not have acknowledged the debt. Under these facts, defendant was under a duty to repudiate liability under the agreement before making payment or acknowledging liability."

At no time has petitioner in this case made any payments nor have they ratified the contract nor could the validity of the contract be raised at any time prior to this

law suit being filed. Hence, this authority is not in point.

We are indeed impressed with respondents reference to the fable of Aesop at page 23 of their brief. This Court will determine to whom it applies. We are reminded of a saying in the Babylonian Talmud, Chullin, Fo. 94. B. (C.450 as follows:—

"It is Forbidden to Deceive Even A Heathen."

REPLY TO RESPONDENTS POINT D.

Contract Was Unilateral and Void.

The **Gatliff Coal Company** case cited by Respondents at page 24 of their Brief has no bearing whatever. That was an action for wages based upon a written agreement by an Operator and Union. The Operator contended that a verbal agreement with the Union representative which placed a limit on the wages was binding. The Court held that the act compelled collective bargaining agreements to be in writing, and therefore the defendant was precluded from setting up the oral agreement as a defense.

In order to avoid repetition on this point, we refer the reader to our petition at page 14.

REPLY TO RESPONDENTS POINT E.

1.

INDISPENSABLE PARTIES LACKING

Respondents cite the first **Quality** case (243 Fed. 2nd 771). As we have previously mentioned, the only thing then before the Court was a complaint and answers to interrogatories, and no affirmative defenses. In the present case, Quality has raised issues by affirmative defenses which were

not in the first **Quality** case, and the first **Quality** case is not controlling.

The case of **United States** v. **Embassy Restaurant** cited does not in any way assist. The decision therein held that contributions to a Welfare Fund were not wages and was enforceable by the Trustees by virtue of the collective bargaining agreement.

The case of **United States** v. **Carter**, 1 L. Ed. (2d) 776, 353 U. S. 210, pertained to the interpretation of the Miller Act with reference to construction work on Federal projects and whether the contractor's bond was liable under the Act. The contract involved provided, "The Trustees had sole power to demand and enforce prompt payment of employer contribution." No such clause is in the contracts alleged in the amended complaint.

The contracts involved in this present litigation provide:

> " * * * for the exclusive use and benefit of the contracting parties."

Since the **Carter** case involved the interpretation of a Federal Act and in view of the expressed right of the Trustees as set out in the contract, the Court made its decision on those issues, which are not involved here and are not controlling.

The quotation in the **Carter** case wherein the Trustees had exclusive right to enforce it, is in complete harmony with the contract giving Trustees exclusive right. But how can they reconcile the fact the Union negotiated the contract on behalf of the workers and how can they explain the agreement of March 5, 1950 at Page 39 of their brief which provides:

> "Failure of any operator signatory hereto to make full and prompt payments of the amounts required

> hereby, in the manner and on the dates herein provided, **shall at the option of the United Mine Workers of America, be deemed a violation of this agreement** * * *." (our emphasis)

There are no allegations in the seconded amended complaint that the United Mine Workers of America, have declared a violation on part of petitioner. The only allegation in Rhetorical paragraph 6, is that respondents have demanded payments of petitioner which was refused. Petitioner's 6th Rhetorical paragraph of 1st defense denies they owe plaintiffs. Hence it is a condition precedent that the United Mine Workers of America declare a violation which has not been done.

Since the United Mine Workers of America must declare a violatior, then they are the real party in interest, and an indispensable party to this law suit.

> "Rights of 3rd parties to sue on a contract entered into for his benefit are no greater than those of the parties thereto, and the beneficiary who seeks to take advantage of the contract must take it subject to the defenses and inherent equities between promisor and promisee." U. S. v. **Campbell**, 138 Fed. (2) 424.

Contractual rights must be enforced, in action at law or in equity in the name of the injured contracting party. **State Ex Rel.** v. **Brand**, 214 Ind. 347, 13 NE (2) 955, Sup.

Relative to **United Marine** v. **Essex Transportation Company**, cited by respondent at Page 27, the agreement in that case was oral and the only question was whether or not the payment of money was a promise to pay "any representative of any of his employees", in violation of Section 186 (a), (b), therefore that case has no bearing whatsoever.

Respondents seem to take a great pride in quoting out of context from the various court decisions submitted by them. In the reading of said cases in their entirety, it does not appear that they sustain the conclusions which respondents urge upon this court. What is so aborative in citing **Lewis** vs **Benedict Coal Co.**, 259 Fed., 2, 346? This case is now before this Court. And it remains the law until this Court states otherwise.

There is no question in our mind that the 2nd Circuit handed down a correct ruling. It is mighty easy for the Union to force the operator to submit to impossible demands and threaten them with unlawful shutdowns and when the illegal actions are submitted to a Court, they go into platitudes to justify their actions.

REPLY TO RESPONDENTS POINT F.

No Trust Was Created.

Without prolonging the reply to this point, we respectfully adopt by reference our statement at pages 16 and 17 of our petition.

In conclusion we say that bound as we are by the record in this case, it seems reasonable to conclude that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. JETT
505 Ohio St.
Terre Haute, Ind.

N. GEORGE NASSER
24 No. 6th St.
Terre Haute, Ind.
Attorneys for Petitioner